

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



74-1303

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT

No. 74-8076  
74-1303

UNITED STATES OF AMERICA

Plaintiff - Appellee

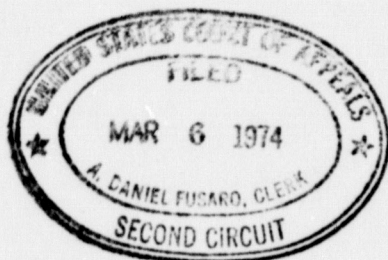
vs.

JOHN DOE  
(Emil Sapere, James Consiglio,  
Michael O'Brien, Michael Charizio,  
and Edwina Dawidowicz)

Defendants - Appellants

ON APPEAL FROM A JUDGMENT AND ORDER OF THE  
UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF CONNECTICUT

APPELLANTS' BRIEF



William P. Murray, Esquire  
62 LaSalle Road  
West Hartford, Connecticut 06107  
203-521-7500

W. Paul Flynn, Esquire  
132 Temple Street  
New Haven, Connecticut  
203-772-1470

Joseph E. Fazzano, Esquire  
100 Constitution Plaza  
Hartford, Connecticut  
203-525-0843

## TABLE OF CONTENTS

	Page
Statement of Issues Presented for Review . . . . .	1
Statement of the Case . . . . .	2
Statement of Facts . . . . .	2
Statement of Argument . . . . .	
Insufficient Record . . . . .	5
Denial of Evidentiary Hearing . . . . .	7
Statutory Defenses to Subpoena Enforcement . . . . .	9
Effective Assistance of Counsel . . . . .	11
Prosecutorial Harrassment . . . . .	13
Conclusion . . . . .	14

## TABLE OF CASES

	Page
Beverly v. United States, 468, F. 2d 732 (5 Cir. 1972)	10
Bransburg v. Hayes, 408 U. S. 665, 33 L. Ed. 2d 626	8
Coleman v. Alabama, 399 U. S. 1, 26 L. Ed. 2d 387	13
Escobedo v. Illinois, 378 U. S. 478, 490, 12 L. Ed. 2d 977	13
Gelbard v. United States, 408 U. S. 41, 33 L. Ed. 2d 179	10, 11
Groppi v. Leslie, 404 U. S. 496, 500, 30 L. Ed. 2d 632-636	6
In Re: Evans, 452 F. 2d 1239 (D. C. Cir. 1971)	10
In Re: Schofield, _____ F. 2d _____, (3 Cir. 9/11/73), 14 Cr. L. 2033	6, 8



	Page
Massiah v. United States, 377 U. S. 201 12 L. Ed. 2d 246	12
Spano v. New York, 360 U. S. 315	12
United States v. Alter, 482 F. 2d 1016 (9 Cir. 1973)	9, 10
United States v. Calandra, _____ U. S. _____, 14 Cr. L. 3061 (January 8, 1974)	8
United States v. Dionisio, 410 U. S. 1, 35 L. Ed. 2d 67	6, 8
United States v. Doe, 405 F. 2d 436, 438 (2 Cir. 1968)	14
United States v. Duncan, 470 F. 2d 961 (9 Cir. 1972)	10
United States v. Huss, 482 F. 2d 38 (2 Cir. 1973)	10
United States v. Smilow, 472 F. 2d (2 Cir. 1973)	9
United States v. Wade, 388 U. S. 218, 18 L. Ed. 2d 1149	13

#### TABLE OF MISCELLANEOUS AUTHORITIES

	Page
Dash, <u>The Indicting Grand Jury: A Critical Stage?</u> , Amer. Crim. L. Rev. vol. 10, no. 4, Summer 1972, p. 807, et sq.	13
<u>The Prosecution and the Defense Function,</u> American Bar Association Project on Standards for Criminal Justice, Approved Draft, 1971, sections 3.5 and 3.6	14

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the record before the District Court was insufficient for it to order the appellant to furnish a voice exemplar and thus whether such order is violative of the appellant's due process rights under the Fifth Amendment.
2. Whether the District Court's rulings effectively denying the defendant below an evidentiary hearing to contest the government's claim was violative of the appellant's due process rights under the Fifth Amendment.
3. Whether the government and the District Court in the wire interception and Grand Jury proceedings below denied and/or thwarted the indicted appellant the effective assistance of counsel secured to him under the Sixth Amendment.
4. Whether the governmental activity before the Grand Jury, supported by District Court order to furnish a voice exemplar, is the fruit of governmental intrusions violative of the appellant's constitutional and statutory rights.
5. Whether upon the appellant's claim of illegality under 18 United States Code section 3504, the government failed to meet its resulting burden of proof and thus the District Court order to furnish the exemplar was erroneous.
6. Whether the compulsion brought on by the United States for the appellant to appear before the Special Grand Jury is the result of prosecutorial harrassment and thus violative



of the appellant's due process rights under the Fifth Amendment.

#### STATEMENT OF THE CASE

Emil Sapere, the defendant--appellant is a resident of Wethersfield, Connecticut. Since May 3, 1972 he has stood indicted in the United States District Court at Hartford for violations of 18 United States Code, section 1955. On February 26, 1974 in that court with the Honorable T. Emmet Clarie presiding, the defendant was adjudged in civil contempt and ordered confined upon his respectful refusal, based on advice of counsel, to furnish a voice exemplar, as ordered, to a Special Grand Jury. Subsequently, the defendant filed in the District Court a Notice of Appeal of the judgment of contempt and order of confinement and submitted a Motion for Expedited Appeal.

#### STATEMENT OF FACTS

Emil Sapere, the appellant--defendant, has stood indicted since May 3, 1972 in the District Court for violations of 18 United States Code, section 1955. In connection with the bringing on and prosecution of that Indictment, extensive court-ordered wiretapping was carried on by agents of the Federal Bureau of Investigation. In response to pre-trial disclosure related to the Indictment, the government revealed that it had monitored over three hundred of this appellant's phone calls and had an agent capable of identifying Mr. Sapere's

voice on each call. The trial of the Indictment, docketed H-263 in the District Court, has been stayed by agreement of the parties pending decisions of the United States Supreme Court on issues related to authorizations for wire interception authority by a former Attorney General of the United States.

During the pendency of the Indictment, the appellant received two inventory notices issued by the Strike Force Attorney, Paul E. Coffey, pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, indicating that appellant's telephone conversations had again been monitored between March 22, 1973 to April 2, 1973 and between May 9, 1973 and May 14, 1973.

Under date of September 27, 1973 the appellant was subpoenaed to testify before a Grand Jury on October 10, 1973. On this October date, the District Court impanelled a Special Grand Jury and the Strike Force Attorney sought a voice exemplar from Mr. Sapere. Upon the advice of counsel, the appellant respectfully refused and was thereupon presented before the District Court (Clarie, J.). However, based upon objections as to the nature of the proceedings by appellant's counsel, the court directed the government to file applying papers for an order to compel the taking of a voice exemplar.

One of the instruments filed by the government in behalf of seeking the appellant's voice exemplar was the Strike Force Attorney's own affidavit. In this document, Mr. Coffey indicates that the government's inquiry before the Special Grand Jury



"is predicated, in part, upon lawfully intercepted wire communications"; that it is both essential and necessary for the government to have a voice exemplar; that the voice exemplar will not be used at the trial of H-263, the pending Indictment. The affidavit also says that the wire interceptions which the government represents to be involved with its request for a voice exemplar have not revealed to the government defense strategy on the pending Indictment nor confidential conversations between the appellant and his counsel.

On November 12, 1973 a further hearing was convened in the District Court (Clarie, J.) during which appellant's counsel moved to strike the government attorney's affidavit as being hearsay and also being legally insufficient to reveal the stated need for a voice exemplar. Thereafter appellant's counsel made offers of proof involving the calling of the Strike Force Attorney himself and two subpoenaed FBI agents to show that the taking of the exemplar was not essential and necessary, but rather harrassment. Appellant's counsel had also filed a Motion for Discovery and Inspection to obtain the government's applying papers, court orders as well as the tapes and logs related to the wire interceptions. In these proceedings counsel for the appellant claimed further that the requested voice exemplar was the product of governmental activity violative of Mr. Sapere's constitutional and statutorily protected rights. -- Under date of February 19, 1974 the District Court denied all requested relief to the appellant and ordered him to furnish a voice exemplar.

On February 26, 1974 a further hearing was convened in the District Court when the appellant respectfully refused to furnish the voice exemplar. During this hearing the court denied the appellant's Motion for Discovery and Inspection; refused the government's request for finding the appellant in criminal contempt; adjudged the appellant in civil contempt and ordered him confined.

Collateral to the proceedings incident to the Indictment which is pending, but arising out of the wiretapping related to that Indictment, the Strike Force Attorney has coordinated actions with the Internal Revenue Service. This has resulted in that Service's assessing the appellant on a jeopardy basis over one million dollars in federal wagering excise taxes and foreclosing liens related to those assessments against some of this appellant's property.

Under Docket No. 73-2540 in this Court, there is a pending appeal involving the denial of discovery related to the court-ordered wire interceptions for which the Strike Force Attorney is presumed to be seeking a voice exemplar.

#### STATEMENT OF ARGUMENT

##### Insufficient Record

Since governmental power for the establishment of our republic is derived from the will of the people, inherent in its exercise must be the qualities of reasonableness and due



process. This is particularly so when the power of contempt is welling up against one of the citizens. Groppi v. Leslie, 404 U. S. 496, 500, 30 L. Ed. 2d 632-636.

Here the defendant was subpoenaed to testify before a Special Grand Jury on October 10, 1973, the very day the Special Grand Jury was impanelled by the District Court. Shortly after the impanelling, the defendant was presented by the Special Attorney before this Grand Jury and requested to furnish a voice exemplar. When he refused, he was presented before the District Court (Clarie, J.) for subpoena enforcement by court order. However, because of the appellant's objections based primarily on due process grounds and reliance upon In Re: Schofield, \_\_\_\_\_ F. 2d \_\_\_\_\_ (3 Cir. 9/11/73), 14 Cr. L. 2033, the court directed the government to file applying papers. In response to that court directive, the court filed a motion and the affidavit of Special Attorney, Paul E. Coffey.

Essentially, the Coffey affidavit is an attempt by the government to make a showing of reasonableness and to comply with the holding in United States v. Dionisio, 410 U. S. 1, 35 L. Ed. 2d 67. While the District Court obviously acted in reliance upon this affidavit, the appellant submits that it erred not only because it is hearsay but also because it is grossly conclusionary in attempting to show that the government's request is in fact reasonable. Specifically, the affidavit is conclusionary on the matters that are critically in issue i.e. lawful

interception and the request for the exemplar being "essential and necessary".

Both Dionisio, supra, and Schofield, supra, require a showing of reasonableness prior to the government's being able to obtain a court order in aid of subpoena enforcement. The appellant submits that the District Court's reliance upon the affidavit is misplaced not only because that document constitutes hearsay and is conclusionary on the critical issues, but also because the District Court itself, having supervised the wire interceptions here and the pending Indictment, is on notice that the government is fully capable of identifying the appellant's voice with at least one FBI agent who admits that ability; and has presumably aided the Strike Force Attorney in identifying the defendant's voice on the tapes involved here so that the government's attorney could, pursuant to court directive, serve inventory notices upon Mr. Sapere. These circumstances, together with the fact that the wire interceptions in question are still under the seal of the District Court and hence presumably not available to the Grand Jury, compel the conclusion on this record that the government has failed to make an adequate showing of reasonableness.

Denial of Evidentiary Hearing

In addition to moving to strike the prosecutor's affidavit, the defendant on November 12, 1973 contested the representation made by the government in the affidavit that the sought after



voice exemplar was essential and necessary and sought to prove his position by offering two subpoenaed FBI agents and the Special Attorney himself, who had been given prior notice that he would be subject to the defendant's offer of proof. The District Court denied the defendant an evidentiary hearing and relied primarily in its decision upon United States v. Dionisio, supra, and the recent decision, United States v. Calandra, \_\_\_\_\_ U. S. \_\_\_\_\_, 14 Cr. L. 3061 (January 8, 1974). However, neither case is authority for the proposition that under no circumstances shall there be evidentiary hearings concerning matters ancillary to subpoena enforcement related to Grand Jury proceedings. Calandra stands for the proposition that the exclusionary rule will not be applicable to Grand Jury proceedings while Dionisio holds that neither Fourth Amendment seizure nor Fifth Amendment self incrimination jurisprudence shall apply to voice exemplars. As Chief Judge Seitz noted in his concurring opinion in Schofield, Dionisio "does not negate the possibility that the minimal showing of proper purpose can be factually litigated by the witness." Schofield, \_\_\_\_\_ F. 2d \_\_\_\_\_, 14 Cr. L. 2035. Actually, Mr. Justice Stewart, writing for the court in Dionisio, while discussing First Amendment claims in Bransburg v. Hayes, 408 U. S. 665, 33 L. Ed. 2d 626, specifically mentioned that the court would entertain due process claims as a defense to subpoena enforcement. Dionisio, \_\_\_\_\_ U. S. \_\_\_\_\_, 35 L. Ed. 2d at 78. Thus, prior to going jail, the indicted appellant respectfully submits that he on Fifth

Amendment grounds is entitled to attempt to prove in an evidentiary hearing that the government does not need what it is seeking.

United States v. Alter, 482 F. 2d 1016 (9 Cir. 1973).

Statutory Defenses to Subpoena Enforcement

The already indicted defendant below made claim pursuant to 18 United States Code, section 3504 that the Special Grand Jury's request for his voice exemplar was the primary product or an instance of exploitation of wiretapping that was illegal and unconstitutional. In support of this claim, Mr. Sapere had filed a Motion for Discovery and Inspection, which the court denied. The District Court indicated that Section 3504 was not applicable because testimony was not sought. The appellant submits that the District Court's application of Section 3504 is erroneous since the scope of that statute is framed in terms of evidence, not simply testimony, and a voice sample, it is submitted, is certainly evidence.

Since Section 3504 applies to these Grand Jury proceedings, the record fails to reveal that the government has met its resulting burden of proof under the statute. The only statement by the government concerning the legal and constitutional propriety of the wire interceptions may be found in the Special Attorney's affidavit where he describes the interceptions as "lawfully intercepted wire communications."

Upon the appellant's claims pursuant to Section 3504, the statute places a specific duty upon the government to respond. United States v. Smilow, 472 F. 2d 1193 (2 Cir. 1973). The mere conclusory statement in the affidavit of the Special



Attorney is totally insufficient to meet this burden of proof. United States v. Huss, 482 F. 2d 38 (2 Cir. 1973); In Re: Evans, 452 F. 2d 1239 (D. C. Cir. 1971). See particularly United States v. Alter, 482 F. 2d 1016 (9 Cir. 1973) on a prosecutor's affidavit being inadequate under Section 3504. Accordingly, since the record reveals that the government did not comply with the statutory mandate, the District Court ought not to have found this defendant in contempt and committed him to jail. United States v. Duncan, 470 F. 2d 961 (9 Cir. 1972); Beverly v. United States, 468 F. 2d 732 (5 Cir. 1972). In Gelbard v. United States, 408 U. S. 41, 33 L. ed. 2d 179 the court in footnote 23 observed that in those proceedings the Ninth Circuit returned the case to the District Court upon a similar failure of proof by the government.

In addition to his statutory rights under 18 United States Code, Section 3504, the indicted defendant in refusing to furnish the sought after voice exemplar relies on 18 United States Code, Section 2515 in defense to the subpoena proceedings. The District Court below ruled that this section is also not applicable because the defendant's testimony was not being sought. However, the appellant submits that this statute like Section 3504 is framed in terms of evidence and is consequently applicable. In support of his claim, the appellant attempted to bolster it by seeking discovery from the court which had approved apparently additional wiretapping while he stood before that very same court under indictment. The defendant submits

that what the Supreme Court in Gelbard, supra, wrote concerning compelling testimony might analogously be applied to compelling here his voice exemplar.

Contrary to the Government's assertion that the invasion of privacy is over and done with, to compel the testimony of these witnesses compounds the statutorily proscribed invasion of their privacy by adding to the injury of the interception the insult of compelled disclosure. Id. at 51-52, 33 L. ed. at 189.

Effective Assistance of Counsel

The defendant, Emil Sapere, stands indicted for violations of 18 United States Code, Section 1955 in the District Court. While under Indictment and entitled to the effective assistance of his counsel, that court has ordered him to enter the secrecy of the Grand Jury chamber to give a voice exemplar. Based upon events affecting other witnesses, it is believed that once in the Grand Jury room the indicted defendant will be asked to read from a card and respond with his name, address, telephone number and then perform a reading on the subject of the Declaration of Independence. Appellant's counsel has never been shown the card involved. It is also understood that the equipment to be used to take this voice exemplar involves a tape recorder, a phone, and a microphone.

Both the government and the District Court insist that this procedure is not testimonial. The appellant disputes that contention upon the ground that the very identification procedure used is testimonial. Giving one's address and



especially telephone number would be very helpful admissions from this defendant in any prosecution involving telephone numbers, their location and such admissions constitute integral links in the chain of connection to this defendant by the Special Grand Jury, which the prosecutor indicates is about ready to indict the defendant again.

In Massiah v. United States, 377 U. S. 201, 12 L. Ed. 2d 246, the Supreme Court reasserted the rule of Spano v. New York, 360 U. S. 315 --that where an accused is clearly entitled to a lawyer's help, after indictment, a deliberate eliciting of a confession was improper--and proceeded to adopt a more encompassing rule:

Any secret interrogation of the defendant, from and after indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness. Massiah, supra, at 205, 12 L. Ed. 2d at 250.

Not only is the defendant -- Sapere indicted, but he has become the target of the Special Attorney of the Strike Force and now the Special Grand Jury itself. Under these circumstances, he is, it is submitted, at a critical stage of the proceedings against him and is entitled under the Sixth Amendment to the effective assistance of counsel throughout the Grand Jury proceedings and in the Grand Jury room. The proceedings below, approved by the District Court orders, interfere with and thwart the appellant's Sixth Amendment rights. No system worth preserving should have to fear that if an accused is permitted to consult with his lawyer, he will exercise constitutional and statutory

rights. Escobedo v. Illinois, 378 U. S. 478, 490, 12 L. Ed. 2d 977; United States v. Wade, 388 U. S. 218, 18 L. Ed. 2d 1149, Coleman v. Alabama, 399 U. S. 1, 26 L. Ed. 2d 387; Dash, The Indicting Grand Jury: A Critical Stage?, Amer. Crim. L. Rev. vol. 10, no. 4, Summer 1972, p. 807, et sq.

#### Prosecutorial Harrassment

The appellant submits that the compulsion brought on by the government to take his voice exemplar is a result of prosecutorial harrassment. In this context, the defendant on two separate occasions has been forced in front of the Special Grand Jury to refuse its request for a voice exemplar. These circumstances have placed the witness in an extremely prejudicial position before those people who will decide whether he is to be indicted once again.

When all of the governmental activity as related to this case is viewed broadly, particularly the Internal Revenue Service proceedings which have been also coordinated by the Strike Force Attorney and have resulted in the enforcement of liens for waging tax assessments on a jeopardy basis, the conclusion is inescapable, the appellant submits, that the subpoena enforcement activity is the direct result of harrassment by the prosecutor and violative of Emil Sapere's rights to due process under the Fifth Amendment.

Eventhough evidence is not within a testimonial privilege, the due process clause



protects against the use of excessive means to obtain it. United States v. Doe, 405 F. 2d 436, 438 (2 Cir. 1968). See also the Prosecution Function and the Defense Function, American Bar Association Project on Standards for Criminal Justice, Approved draft, 1971, sections 3.5 & 3.6.

## CONCLUSION

It is respectfully submitted that the District Court judgment of contempt and order of confinement ought to be reversed.

Respectfully submitted,

William P. Murray, Esquire  
62 LaSalle Road  
West Hartford, Connecticut 06107  
203-521-7500  
Attorney for Appellant, Emil Sapere

W. Paul Flynn, Esquire  
132 Temple Street  
New Haven, Connecticut  
203-772-1470  
Attorney for Appellant, James Consiglio

Joseph E. Fazzano, Esquire  
100 Constitution Plaza  
Hartford, Connecticut  
203-525-0843  
Attorney for Appellants, Michael O'Brien,  
Michael Charizio, & Edwina Dawidowicz